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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. SENATOR DIANNE FEINSTEIN; U.S. REPRESENTATIVES ELTON GALLEGLY, DAVID DREIER, CHRISTOPHER COX, JAY KIM, GARY CONDIT, KEN CALVERT, STEPHEN HORN, RICHARD POMBO, JOHN DOOLITTLE, EDWARD ROYCE, JERRY LEWIS, WALLY HERGER, RANDY CUNNINGHAM, HOWARD MCKEON, FRANK RIGGS, GEORGE RADANOVICH, BRIAN BILBRAY, SONNY BONO, JANE HARMAN, JAMES E. ROGAN, PHILIP M. CRANE, TILLIE FOWLER, KAREN THURMAN, GERALD SOLOMON, SUSAN MOLINARI, AND BOB FRANKS; CALIFORNIA SENATORS K. MAURICE JOHANNESSEN, JAMES L. BRULTE, RICHARD L. MOUNTJOY, RICHARD RAINEY, AND BRUCE MCPHERSON; AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. The Issues Presented Are of Nationwide Significance and Are the Subject of Nationwide Litigation 5

II. The Court Should Decide Whether Claims Challenging the Federal Government's Policy of Nonreimbursement Are Justiciable Under Either the Tenth Amendment or the Invasion Clause . . . 8

III. The Court Should Decide Whether the Tenth Amendment Allows the Federal Government to Force States to Bear the Fiscal Burden Resulting from Their Federally-Imposed Obligations to Provide Services to Illegal Aliens 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases:

Arizona v. United States,
104 F.3d 1095 (9th Cir. 1997) 7
Baker v. Carr,
369 U.S. 186 (1962) 11, 13
Chiles v. United States,
69 F.3d 1094 (11th Cir. 1995),
cert. denied, 116 S. Ct. 1674 (1996) 7, 8, 10
Dames & Moore v. Regan,
453 U.S. 654 (1981) 15
David V. Bandemer,
478 U.S. 109 (1986) 11
DeCanas v. Bica,
424 U.S. 351 (1976) 19
Gregory v. Ashcroft,
501 U.S. 452 (1991) 9
Goldwater v. Carter,
444 U.S. 996 (1979) 11, 15
Henderson v. Mayor of the City of New York,
92 U.S. 259 (1876) 6
Japan Whaling Ass'n v. American Cetacean Society,
478 U.S. 221 (1986) 11, 14
Luther v. Borden,
48 U.S. (7 How.) 1 (1849) 12
Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 9
New Jersey v. United States,
91 F.3d 463 (3d Cir. 1996) 7, 8, 10
New York v. United States,
505 U.S. 144 (1992) . . . . . *passim*
Nixon v. United States,
506 U.S. 224 (1993) 11

Pacific States Tel. & Tel. Co. v. Oregon,
223 U.S. 118 (1912) 12
Padavan v. United States,
82 F.3d 23 (2d Cir. 1996) 7, 8, 10
Plyler v. Doe,
457 U.S. 202 (1982) . . . . . *passim*
Powell v. McCormack,
395 U.S. 486 (1969) 11
Seminole Tribe v. Florida,
116 S. Ct. 1114 (1996) 9
Texas v. United States,
106 F.3d 661 (5th Cir. 1997) 7, 8
U.S. Dep't of Commerce v. Montana,
503 U.S. 442 (1992) 11
United States v. Curtiss-Wright Export Corp.,
299 U.S. 304 (1936) 14, 15
United States v. Lopez,
115 S. Ct. 1624 (1995) 9
United States v. Munoz-Flores,
495 U.S. 385 (1990) 11
Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 14, 15

Constitutional Provisions and Rules:

U.S. Const., Art. IV, § 4 . . . . . 3, 12
Invasion Clause . . . . . *passim*
U.S. Const., Amend X . . . . . *passim*
Fed.R.Civ.P. 12(b)(6) 3

Miscellaneous:

E. Hall, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*,
44 U. Pitt. L. Rev. 409 (1983) 19

INTERESTS OF THE *AMICI CURIAE*

The *amici curiae* filing this brief are a bipartisan group of Members of the United States Congress and the California Senate, the Washington Legal Foundation, and the Allied Educational Foundation.[1] The *amici,* who support the complaint filed in this litigation by the State of California, believe that inadequate enforcement of the federal immigration laws -- which only the federal government has the power to enforce -- has created an untenable situation for lawful residents in California and other affected states. The *amici* further believe, for the reasons set forth in this brief, that the federal government's failure to compensate states for certain burdens from illegal immigration is unlawful.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in ensuring that the rights of states are fully protected by the federal government. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court and other federal and state courts. In particular, WLF filed *amicus* briefs in this case in both the district court and the court of appeals. It filed *amicus* briefs at various levels of the federal courts, on behalf of itself and a bipartisan group of 42 Members of Congress, in support of a similar lawsuit brought by the State of Florida, *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied,* 116 S. Ct. 1674 (1996). WLF also represented a group of federal legislators in

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[1] Pursuant to Supreme Court Rule 37.6, *amici* hereby state that no counsel for a party in this case authored this brief in whole or in part.

support of the State of Texas in its similar lawsuit, *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997).

The legislators joining the brief are U.S. Senator Dianne Feinstein; U.S. Representatives Elton Gallegly, David Dreier, Christopher Cox, Jay Kim, Gary Condit, Ken Calvert, Stephen Horn, Richard Pombo, John Doolittle, Edward Royce, Jerry Lewis, Wally Herger, Randy Cunningham, Howard McKeon, Frank Riggs, George Radanovich, Brian Bilbray, Sonny Bono, Jane Harman, James E. Rogan, Philip M. Crane, Tillie Fowler, Karen Thurman, Gerald Solomon, Susan Molinari, and Bob Franks; and California Senators K. Maurice Johannessen, James L. Brulte, Richard L. Mountjoy, Richard Rainey, and Bruce McPherson.

The Allied Educational Foundation is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, the Allied Educational Foundation is dedicated to promoting education in diverse areas of study, and is concerned with the financial impact of illegal immigration upon public educational systems.

Amici submit this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement of the Case in Petitioners' brief.

In brief, the State of California filed suit seeking relief from the consequences of what it argues is a failure by the

federal government to enforce the immigration laws. California seeks declaratory and injunctive relief as well as money damages to compensate it for expenses it incurred as a result of that failure.

Evidence submitted by California indicated that there are now 1.7 million undocumented aliens living illegally in the State (5% of California's population) and that the number increases by about 125,000 per year. Petition Appendix ("Pet. App.") 9. In the fiscal year in which suit was filed, California spent nearly $2.4 billion in providing federally mandated education and health care benefits to illegal aliens and in incarcerating illegal aliens who commit crimes within the State. *Id.* The annual cost of providing education to illegal alien children alone is $1.5 billion. *Id.* at 10 n.3. California seeks reimbursement for these costs from the federal government.

Among the statutory and constitutional provisions cited by California in support of its claim were the Tenth Amendment to the Constitution and the Invasion Clause of Article IV, § 4 of the Constitution (which requires the United States to "protect each of [the States] against Invasion"). California asserts that since the federal government concedes that the 1.7 million undocumented aliens are in the State illegally yet makes little effort to deport them, prohibits California from attempting to deport them, and requires California to provide services to them, the Constitution requires the federal government to reimburse California the cost of providing those services.

The U.S. District Court for the Southern District of California dismissed the complaint in March 1995 pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. The court held that Cali-

fornia's Invasion Clause claim presented a nonjusticiable political question (Pet. App. 34), and also held that no such claim could be made out in the absence of evidence that the undocumented aliens had come to California with a "hostile" intent. *Id.* at 31-32. The district court dismissed California's Tenth Amendment claim on the ground that the federal government had not commandeered the apparatus of state government -- because California could avoid any obligation to provide health care benefits to illegal aliens by declining to accept federal funds and because the obligation to provide education to illegal alien children was imposed by the U.S. Constitution, not by federal government policy. *Id.* at 37-38, 46. The court also held that all claims for reimbursement were barred by sovereign immunity. *Id.* at 47-48.

On January 7, 1997, the U.S. Court of Appeals for the Ninth Circuit affirmed. The court agreed with the district court that California's Invasion Clause claim presented a nonjusticiable political question. *Id.* at 11-13. The court also agreed that California had failed to state a claim under the Tenth Amendment. *Id.* at 14-18. The court held that California voluntarily assumed the obligation to provide medical services to illegal aliens when it accepted federal Medicaid funds (Pet. App. 15) and that California was not required to pursue the penal policy that resulted in the incarceration of illegal aliens at State expense. *Id.* at 17. The court held that the Tenth Amendment was not implicated by the obligation imposed on California to provide education to illegal aliens, because "the obligation to provide this education derives from an independent constitutional obligation and not federal immigration policy, *see Plyler v. Doe,* 457 U.S. 202, 230 (1982)." *Id.* at 18. The court added that the Tenth Amendment claims were "unquestionably beyond the authority of the judicial

branch" because they presented nonjusticiable political questions. *Id.*

REASONS FOR GRANTING THE PETITION

The virtual abdication of federal responsibility over immigration enforcement, combined with the educational, medical, and law enforcement obligations that California and similarly-situated States must assume, has created an unfunded federal mandate of monumental proportions. The constitutionality of this mandate has been or is being tested by numerous States seeking judicial relief that would compel the federal government to fulfill its duty either to enforce the immigration laws adequately or to compensate for the costs incurred as a result of federal nonfeasance. The magnitude of this litigation -- in terms of the amount of taxpayer funds at issue, the number of States involved, and its implications for federal-state relations -- justifies this Court's review. That review should encompass both the Ninth Circuit's application of the political question doctrine and its rejection of California's Tenth Amendment claims on their merits.

I. The Issues Presented Are of Nationwide Significance and Are the Subject of Nationwide Litigation

Throughout the history of the United States, immigrants have made invaluable contributions to our society. But illegal immigration has created significant demands on public resources in recent years. These demands are not spread evenly throughout the nation, but rather are concentrated upon a small number of states, particularly California.

During the first century of the Nation's history, immigrants were numerous, but the legal relationship between the States and the federal government during that period was such that the immigrants created fewer demands on State resources. Most importantly, the states themselves were thought to have an independent authority to regulate immigration -- and they did so to protect themselves against the costs of immigrants who might become public charges. *See Henderson v. Mayor of the City of New York*, 92 U.S. 259 (1876).

Not until 1876, in *Henderson*, did this Court hold such state regulations unconstitutional. There, the Court struck down an 1824 New York State statute that required masters of passenger ships to provide either: (1) a $300 bond for any foreign passenger "to indemnify the commissioners of emigration, and every county, city, and town in the State, against any expense for the relief of the person named in the bond for four years thereafter," or (2) a fee of $1.50. *Henderson*, 92 U.S. at 267. The Court held that the statutes impermissibly interfered with the authority of Congress "to regulate commerce with foreign nations." *Id.* at 270-71. The Court in *Henderson* also struck down similar statutes of California and Louisiana. *Id.* at 273-75.

Today, therefore, the States themselves have no power to enforce federal immigration laws. As a consequence, the fiscal burden upon the States from immigration is greatly magnified by the federal government's failure to enforce its own immigration laws adequately. The district court in this case acknowledged as much, even as it rejected California's claims: "[T]he State of California does have valid concerns about the financial drain caused by an issue over which it has no jurisdiction; that is, the control of the border." Pet. App. 27.

As the result of federally imposed requirements, and the need to protect California residents who are lawfully present, the State of California must provide costly medical and educational services to illegal aliens without federal reimbursement, and must also expend considerable resources on the apprehension of illegal aliens who commit crimes in the State. Pet. App. 9-10 & n.3.

In response to these federal mandates, the constitutionality of the federal government's failure to provide reimbursement is not just the subject of this action, but of litigation brought by States across the country: Arizona,[2] Florida,[3] New York[4], New Jersey,[5] and Texas.[6] These states brought suit in recognition of the impossibility of obtaining relief in the national political arena, given that the fiscal burdens from illegal immigration are now borne disproportionately by only a handful of states. While none of the six suits (which all raised Tenth Amendment claims and five of which raised Invasion Clause claims) has been successful to date, three of them are still pending -- this suit plus the ones brought by Arizona and Texas. Moreover, the five appeals courts hearing these cases diverged significantly in their approaches to the Tenth Amendment

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[2] *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997), *cert. pending* (No. 96-1595, filed Apr. 7, 1997).

[3] *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1674 (1996).

[4] *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996)(lawsuit brought by state legislators).

[5] *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996).

[6] *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997).

claims: the court below as well as the Third Circuit (*New Jersey*, 91 F.3d at 470) held that the States' Tenth Amendment claims raised nonjusticiable political questions, while the Second, Fifth, and Eleventh Circuit reached the merits of the States' Tenth Amendment claims. *Padavan*, 82 F.3d at 28-29; *Texas*, 106 F.3d at 666; *Chiles*, 69 F.3d at 1097. The decision of virtually all of the affected States to file federal court challenges to the federal government's nonreimbursement policy attests to the importance of the issues raised. Given the importance of the issue, the Court should grant the petition in order to provide guidance to the lower courts regarding the justiciability of the claims raised, and regarding the merits of those claims.

II. The Court Should Decide Whether Claims Challenging the Federal Government's Policy of Nonreimbursement Are Justiciable Under Either the Tenth Amendment or the Invasion Clause

As noted above, virtually all of the States disproportionately affected by the federal government's nonreimbursement policy regarding the cost of services provided to illegal aliens have filed suit challenging that policy. The Ninth Circuit held in this case that the claims raised by California with respect to that policy are simply not justiciable in the federal courts. Given the important position occupied by States in our federal system of government, *amici* submit that it is incumbent upon the Court to decide whether the courthouse door is to be barred to the six States who believe that the federal government's nonreimbursement policy is an affront to their sovereignty.

Judicial review over cases raising questions of federal law has been one of the fundamental principles of this nation's constitutional democracy ever since this Court's

decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). By refusing to exercise judicial review over the constitutional claims raised below, the Ninth Circuit has abdicated its duty and obligation under the Constitution. *Amici* submit that the Ninth Circuit's decision finding a "political question" to exist in an area of such legal and practical importance constitutes an important federal question sufficient to justify a grant of certiorari.

The Ninth Circuit's decision is in conflict with several decisions of this Court and with the general principles of judicial review. If allowed to stand, the Ninth Circuit's decision will remove judicial review from an entire class of cases of great importance to the millions of American citizens that live in the nation's largest judicial circuit. In recent years, this Court has reaffirmed that judicial review ought to apply with equal force to questions involving the relationship between the federal and state governments. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court imposed a clear statement rule upon the Age Discrimination in Employment Act so as to protect state sovereignty over the employment of its own officials. In *New York v. United States*, 505 U.S. 144 (1992), the Court invalidated an attempt by Congress to commandeer state legislatures via the Commerce Clause. In *United States v. Lopez*, 115 S. Ct. 1624 (1995), the Court invalidated a federal law as beyond Congress's Commerce Clause powers and more properly within the authority of the states. In *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), the Court invalidated a federal law that allowed states to be sued in federal courts.

In each of these cases, the Court has made clear that judicial review is to extend to federalism questions as well as to cases involving the separation of powers or individual

rights. As this Court acknowledged in *New York*, "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases." *New York*, 505 U.S. at 155. Despite the difficulty, however, "at least as far back as *Martin v. Hunter's Lessee*, the Court has resolved questions of 'great importance and delicacy' in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." *Ibid.* The Ninth Circuit's decision flouts this declaration of constitutional obligation by the Court. Indeed, certiorari is necessary not only to reverse the Ninth Circuit's decision, but also those of other circuits that have invoked the political question doctrine to hold nonjusticiable States' challenges -- under the Tenth Amendment and/or the Invasion Clause -- to the federal government's nonreimbursement policy. *See Padavan*, 82 F.3d at 28; *Chiles*, 69 F.3d at 1097; *New Jersey*, 91 F.3d at 469-70.

The court below found that the meaning and application of the Invasion Clause and the application of the Tenth Amendment to this case constituted political questions outside the competence of the federal judiciary. Pet. App. 11-13, 18. A broad application of the political question doctrine, such as that applied below, ought to be reviewed by this Court in order to ensure that litigants and States are not unconstitutionally being deprived of their right to be heard in federal court. Such a decision by a federal court ought to be reviewed closely by this Court because, unlike other types of non-justiciability — standing, ripeness, and mootness — a finding of a political question means that the specific question of constitutional law, even if meritorious, can *never* be brought in federal court.

Indeed, this Court has demonstrated concern about the seriousness of a finding of a political question by granting review even in the absence of a circuit split. For example, in *Nixon v. United States*, 506 U.S. 224 (1993), this Court reviewed whether impeachment proceedings could be challenged in federal court. Even though this Court ultimately agreed with the District and Circuit Courts for the District of Columbia, which had found the question nonjusticiable, this Court still granted certiorari in order to review the matter. Similarly, this Court has granted certiorari in a number of other cases where the Court's review was necessary to address whether the political question doctrine properly applied. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962); *Powell v. McCormack*, 395 U.S. 486 (1969); *Goldwater v. Carter*, 444 U.S. 996 (1979); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986); *United States v. Munoz-Flores*, 495 U.S. 385 (1990); *United States Department of Commerce v. Montana*, 503 U.S. 442 (1992). These cases were not certworthy because of deep circuit splits, but because they raised important questions of federal law. This case raises the same fundamental issue.[7]

Amici are unaware of even a single decision of this Court in which the political question doctrine was invoked to preclude judicial review of Tenth Amendment issues. *New York* well illustrates that the Court has permitted States to press their Tenth Amendment claims in federal court. In light of *New York*, the Ninth Circuit's

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[7] Moreover, as noted above, the Ninth Circuit's holding that California's Tenth Amendment claims raise nonjusticiable political questions appears to conflict with the holdings of the Second, Fifth, and Eleventh Circuits.

unexplained holding that California's Tenth Amendment claims are nonjusticiable political questions merits review by this Court.

Review by the Court is also especially warranted where, as here, a lower court has extended the political question doctrine to a specific clause of the Constitution for the first time. The Court has not had occasion to review the Invasion Clause in any detail, and if the federal courts are to withdraw the judicial power from any cases involving its meaning, this Court ought to make the ultimate decision. To be sure, the Court has found non-justiciable the Guarantee Clause, which immediately precedes the Invasion Clause in Article IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion"). *See Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Recent decisions of the Court, however, have suggested that the Guarantee Clause may no longer present a political question, at least in all cases. For example, in *New York v. United States*, the Court noted that it had ruled on the merits in several Guarantee Clause cases at the turn of the century, and it suggested that future claims might be addressable on the merits. *New York*, 505 U.S. at 184-86. In fact, this case can present the Court with the vehicle to reconsider whether its earlier decisions to remove Article IV, § 4 from the purview of judicial review is consistent with the constitutional duties of the Judiciary and with the Supreme Court's role in monitoring the balance between federal and state power.

Even if the Court were to leave its Guarantee Clau jurisprudence undisturbed, it should treat the two claus

differently for political question purposes. As discussed in *Baker v. Carr*, the Court has found the Guarantee Clause to be nonjusticiable because of a lack of "judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." *Baker*, 369 U.S. 186, 223 (1962). That absence of standards should not be an impediment to deciding cases under the Invasion Clause, as members of this Court have taken judicial notice before of "the serious national problems caused by the influx of uncountable millions of illegal aliens across our borders." *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting, joined by Justices Rehnquist, O'Connor and White). Indeed, determining whether an "invasion" of California's borders has occurred may require the Court to do no more than ask whether a substantial number of aliens are currently within the state illegally. In the case of California, that figure is at least 1.7 million people, and it is growing every year.

Even if the Court were to agree with the courts below concerning the lack of judicially manageable standards to adjudicate Invasion Clause claims, it must first hear this case in order to reach that conclusion. Unfortunately, the opinion below provides virtually no explanation as to why there are no manageable standards present here, nor do the other appellate court opinions to which the Ninth Circuit cites. Pet. App. 11-13. If this Court is going to countenance the wholesale withdrawal of judicial review from a significant question of constitutional law — one of great practical importance to the citizens of several of the most populous States in the Union — it ought to grant certiorari in this case in order to explain why.

The Court also should review the decision in this case to clarify other elements of the political question doctrine.

In addition to finding no manageable standards present here, the Ninth Circuit concluded that the Invasion Clause implicated foreign policy concerns committed to the political branches, and hence was nonjusticiable. The Court should grant certiorari in this case to clarify that the application of the political question doctrine to foreign affairs cases does not create an exception to judicial review through which other clauses of the Constitution can be removed from the jurisdiction of the federal courts. The Court has applied the political question doctrine to foreign affairs cases in only a few instances, and it has not done so recently. In fact, in the most recent case raising the issue, the Court firmly rejected efforts to clothe all foreign affairs questions within a cloak of nonjusticiability. In *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), the Court unanimously rejected the government's argument that it should not review a decision by the Secretary of Commerce that refused to certify that Japan's whaling practices were in violation of an executive agreement. *Japan Whaling*, 478 U.S. at 229. Under the approach taken by the court below, cases such as *Japan Whaling* would never have been decided on the merits by the Supreme Court.

Even if one recognizes the application of the political question doctrine to some aspects of foreign affairs, the Court clearly has refused to apply the doctrine where, as here, the challenged action has significant effects within the United States. For example, the Court did not invoke the political question in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which contains one of the Court's most significant statements about the foreign affairs power. Nor did the Court turn to the political question doctrine in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which it invalidated President

Truman's decision to seize control of the nation's steel mills to continue munitions production for the Korean War effort. The Court also reached the merits in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), in which it upheld the executive agreement with Iran that transferred claims against the Iranian government to an international arbitral tribunal.

In the most recent foreign affairs case to consider seriously the political question doctrine, *Goldwater v. Carter*, 444 U.S. 996 (1979), several Justices recognized that the doctrine ought not to apply to foreign affairs decisions that had important domestic effects. In a concurring opinion, four Justices found that the question of whether the President had the sole authority to terminate treaties was nonjusticiable. The four Justices distinguished *Youngstown Sheet & Tube* on the grounds that "[here we] are asked to settle a dispute between coequal branches of our Government," and "[the] effect of this action, as far as we can tell, is 'entirely external to the United States, and [falls] within the category of foreign affairs.'" 444 U.S. at 1004-05.

Under the criteria set out in *Goldwater*, questions involving the Invasion Clause should be just as justiciable as were the issues addressed in *Curtiss-Wright*, *Youngstown*, and *Dames & Moore*. First, this case does not involve a dispute between coequal branches of the federal government. The Invasion Clause addresses the obligation that the national government as a whole owes to the States, a type of question the Court recently has declared rests within the competence of the Judiciary. California only seeks an opportunity to have its day in court to explain why it believes that the federal government has failed in this obligation. Second, the national government's action (or

inaction) here is not "entirely external to the United States." In fact, the decision here is almost entirely internal to the United States. California is not asking the Court to review the decision of the political branches on immigration policy or on relations with foreign nations that produce large numbers of immigrants. Instead, California is asking the Court to define what obligations the federal government owes the States when it fails to stem the tide of illegal immigration. A finding that the federal government is in default of its obligation in this regard would not interfere in any way with the federal government's prerogatives -- the political branches would still have the freedom to decide upon, and execute, whatever external immigration policy they feel is best.

Because the decision of the appeals court conflicts directly with this Court's decisions on federalism, judicial review, and the political question doctrine, and because it withdraws judicial review from two constitutional issues of great practical and political importance, the Court should grant the petition.

III. The Court Should Decide Whether the Tenth Amendment Allows the Federal Government to Force States to Bear the Fiscal Burden Resulting from Their Federally-Imposed Obligation to Provide Services to Illegal Aliens

Although the Ninth Circuit held that California's Tenth Amendment claims raised nonjusticiable political questions, it nonetheless went on to reject those claims on their merits. The court held that the federal government could not be said to have "commandeered" the California government in requiring it to pay medical costs of illegal aliens, because California voluntarily assumed the

obligation to provide such medical services when it accepted federal Medicaid funds. Pet. App. 17. The court also held that the Tenth Amendment was not implicated by the obligation imposed on California to provide education to illegal aliens, because "the obligation to provide this education derives from an independent constitutional obligation and not federal immigration policy, *see Plyler v. Doe,* 457 U.S. 202, 230 (1982)." *Id.* at 18.

California has cogently explained why the petition should be granted in order to review the Ninth Circuit's denial of Tenth Amendment claims with respect to medical services (Pet. 25-29), and *amici* will not belabor the point. *Amici* nonetheless wish to expand on California's citation to *Plyler* (Pet. 10-11, 29) in support of its Tenth Amendment claim for reimbursement of the cost of education provided to illegal immigrant children.

Federal law requires California public schools to provide a free education to illegal immigrants. This Court held in *Plyler* that States cannot constitutionally restrict an illegal immigrant child's access to a free public education absent federal authorization. The federal government's failure to limit the flow of illegal aliens into the State means that this unfunded federal mandate imposes a significant cost on California taxpayers.

Neither California nor *amici* seek in this litigation to challenge this Court's ruling in *Plyler* or to deprive illegal alien children of an education. The question, rather, is one of fiscal accountability. As five justices in *Plyler* itself suggested (*Plyler,* 457 U.S. at 241 (Powell, J., concurring); *id.* at 242 n.1 (Burger, C.J., dissenting)), because the federal government has exclusive jurisdiction to enforce the immigration laws, it should assume a corresponding

responsibility to compensate California for the burden that inadequate immigration enforcement has imposed upon California's public schools -- about $1.5 billion per year.

The federal government cannot impose such mandates upon a State without offsetting funding. The Court indicated in *New York* that although the federal government can create incentives for a state to operate a federally-desired program, and under certain circumstances can offer grants conditional on the operation of such a program, it lacks the power to hijack state resources unilaterally for its own ends. *New York,* 505 U.S. at 174-77.

The opinions of the lower courts dismissed California's Tenth Amendment claims regarding educational services on the ground that the services were mandated solely by the Constitution and not by either Congress or the Executive Branch. Pet. App. 18. That is simply not true. The majority in *Plyler* indicated that the States would have more flexibility in limiting the access of illegal aliens to public education if the federal government were to articulate a policy authorizing such limitations. The Court repeatedly indicated that its decision hinged on the lack of a contrary federal policy concerning the education of illegal aliens. "[T]he courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens." *Plyler,* 457 U.S. at 224. "[I]n the area of special constitutional sensitivity presented by these cases, and *in the absence of any contrary indication fairly discernable in the present legislative record,* we perceive no national policy that supports the State in denying these children an elementary education." *Id.* at 226 (emphasis added).

Thus, the holding in *Plyler* in no way forecloses, and in fact invites, congressional action, including action that would effectively resurrect the same state statute found invalid in *Plyler*. *See* E. Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe,* 44 U. Pitt. L. Rev. 409, 430 (1983). Indeed, in *DeCanas v. Bica,* 424 U.S. 351 (1976), the Court permitted California to regulate the employment of illegal aliens -- barring them from working "if such employment would have an adverse effect on lawful resident workers," *id.* at 352 -- because Congress had implicitly authorized such measures.

Contrary to the Ninth Circuit's contention, then, Congress can legitimately be said to have imposed the educational mandate upon California. This Court held in *New York* that the coercive imposition of such a mandate without offsetting compensation is unlawful. Whether the mandate is viewed "as lying outside Congress' enumerate powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." *New York,* 505 U.S. at 177.

Five Justice in *Plyler* argued that the federal government should share the costs associated with its failure to enforce the immigration laws effectively. Chief Justice Burger, joined by three other Justices, stated in dissent:

> It does not follow . . . that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the

> Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here. Surely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation.

Plyler, 457 U.S. at 242 n.1. Justice Powell indicated his agreement. *Plyler,* 457 U.S. at 241 (Powell, J. concurring). The four dissenters and Justice Powell accurately noted the jumbled logic of the current system. Only the federal government can enforce immigration laws; if the federal government fails in its enforcement, it should bear the costs of its failure. Otherwise, the States would be forced to bear costs that they are powerless to protect themselves against, an outcome that the five Justices in *Plyler* recognized as absurd.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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